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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RODERICK ROSHAWN WILLIAMS,

Defendant and Appellant.
_____/

H021627
(Santa Cruz County
Super. Ct. No. S9-10196)

After a jury trial, appellant was found guilty of possession of cocaine base for sale, a violation of Health and Safety Code section 11351.5. On appeal, he contends that he was denied his due process right to present a complete defense when the prosecution failed to preserve "material, exculpatory evidence" recorded on his pager. He further contends that the court erroneously refused to sanction the prosecution by instructing the jury that it must presume that the lost evidence was favorable to him. Finally, appellant contends that the court again violated due process when it refused to allow defense counsel to present testimony impeaching the arresting officer's testimony. We find none of the asserted errors to be prejudicial and therefore affirm the judgment.

Background

In the evening of December 4, 1999, Officer Eric Swannack was patrolling on his bicycle in downtown Santa Cruz. At around 7 p.m. he saw a man referred to as "S-1" come out of an alley. S-1 met up with two other people, appellant and Kara Bobila. Appellant and

S-1 walked down the street together, Bobila 20 to 30 feet behind them. As they turned the corner, Swannack followed. Suspecting that a narcotics transaction was about to occur, Swannack approached the two. He introduced himself and held out his hand to appellant, hoping to see if appellant had anything in his hands. Appellant looked at the officer's hand and ran away. Swannack followed on his bicycle. As he ran appellant kept his hand in his sweatshirt pocket, which Swannack believed contained drugs.

When he reached a parking lot appellant pulled his hand out of the pocket and discarded a light object. Swannack yelled at appellant to stop; when appellant continued running, Swannack tackled him. Backup arrived a few minutes later, and Swannack went back to where appellant had thrown the object.

Almost immediately he found a package on the sidewalk containing five bindles of rock cocaine. Another bindle was lying about a foot away. The six bindles each weighed about .1 gram without packaging and had a street value of about $20. In appellant's pockets were $180 in cash, a small amount of marijuana, and a pager. Swannack noticed that there were 16 numbers recorded on the pager. Swannack testified that the number of pages was consistent with people contacting a drug seller to arrange a purchase of drugs.

Appellant's fiancée, Jennifer Whitehorn, testified for the defense. She stated that she had given appellant her pager to use so she could contact him. On December 4, 1999, she was nearing the end of her pregnancy with appellant's child. She had paged him several times that day, including every hour beginning at 4 p.m. Bobila testified that on December 4 she had just met appellant. She had been "high" on marijuana all day when she ran into him downtown. Appellant did not offer to sell her any drugs.

Appellant also testified. He said that his fiancée had been paging him all day. A few buddies also had his pager number. After he got off work on December 4, he visited a cousin and then went to a friends' house, where he smoked marijuana and drank beer. After a couple of hours Jennifer paged him and he left to go home. His friend gave him some marijuana to take with him. Appellant stopped at a sandwich shop and saw a man he knew as

"Buck," a friend of his mother. Appellant offered to smoke a "joint" with Buck, so the two began walking down the street, smoking marijuana. When Officer Swannack rode up on his bicycle, appellant threw down the joint. He was "really scared" because he had just been caught smoking marijuana when his fiancée was about to have a baby. In addition, there was an arrest warrant out for failure to show up in a "pot case." The officer shook Buck's hand and appellant turned and ran. He did not keep his hands in his pockets. The cash found in his pockets was from his last paycheck and from a loan he had received. Appellant stated that he had not been selling crack cocaine that night; he "d[id]n't have time to sell crack."

After a two-day jury trial appellant was found guilty of the sole count charged, possession of cocaine base for sale. Appellant's motion for a new trial was denied, and he was sentenced to three years' probation with 210 days in county jail.

Discussion

During discovery counsel for appellant sought to examine the pager. The battery had died, however, so the numbers recorded on the device were lost. At trial Officer Swannack testified that he had written down the numbers recorded on the pager and had given the list to Officer Bill Azua. Swannack was sure Azua still had the numbers. He recalled about seven or eight different phone numbers and "several repeats."

At a hearing outside the presence of the jurors defense counsel stated that she had been surprised by Swannack's testimony, because the district attorney had told her that Swannack had not recorded the pager numbers. The next day Officer Azua testified that he had misplaced the list of pager numbers. Following Azua's testimony, defense counsel sought to examine the district attorney to elicit his testimony that Swannack had told him "that he didn't write the numbers down, that there were only numbers, no . . . messages, and that he believed that there w[ere] sixteen pages." Counsel also offered her own testimony regarding this same information that the district attorney had passed on to her.

The trial court, while characterizing the loss of the numbers as "sloppy police work," denied counsel's request for a dismissal or mistrial and declined to allow testimony by the

district attorney. The court also rejected counsel's proposed instruction creating a presumption that any evidence destroyed in bad faith was favorable to appellant.[1]

Appellant challenges these rulings on appeal. He argues (1) the loss of the pager numbers violated his due process right to a fair trial by preventing him from presenting a complete defense; (2) the court erred in failing to impose any sanctions such as dismissal or mistrial for the prosecution's bad-faith loss of the evidence; (3) the court should have instructed the jury to presume the lost evidence was favorable to appellant; and (4) the court should have allowed defense counsel to testify about the prosecutor's representation that Officer Swannack had said he had never written the pager numbers down.

We decline to address each of these contentions individually, because all are premised on the same underlying failing, which was not prejudicial in this case. Even if we assume that the evidence had exculpatory value known to the police, thus permitting an inference of bad faith, the court's failure to sanction the prosecution by an evidentiary presumption or dismissal was not reversible error.

Appellant argues that if the court had imposed a sanction for the loss of the evidence, "there is a possibility that the jury m[ight] have found appellant guilty of a lesser included offense of simple possession, or not found defendant guilty of any offense." That possibility is remote. The primary issue before the jury was not whether appellant possessed the crack cocaine *for sale*, but whether he possessed it at all.[2] The existence of

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1 The proposed instruction stated: "If you find that any law enforcement officer intentionally and willfully attempted to suppress material evidence in any manner (such as intimidating witnesses, not disclosing witnesses or destroying evidence), you must presume that the suppressed evidence would have favored the defendant and that the officer's testimony concerning that evidence may be biased."

2 Indeed, defense counsel pointed out to the jury that the "heart of the matter is did Mr. Williams toss the drugs. That's the heart of the matter."

the pager did not affect the jury's resolution of this central question. Nor was it critical to the determination of whether appellant had the intent to sell. Indeed, there could be no doubt that the cocaine was possessed for the purpose of sale; even aside from the large amount of cash in appellant's pocket, the amount and packaging of the drugs established this element of the crime. Thus, whether or not appellant had an innocent reason for having multiple pages recorded on the device, the jury had no reasonable alternative but to find the drugs were possessed for sale.

To the extent that appellant is suggesting that the pager numbers connected him to the packaged drugs by portraying him as a drug dealer, the result is the same, because the evidence of appellant's possession was overwhelming. Officer Swannack had appellant in sight almost continuously throughout the pursuit, during which appellant kept his hand in his pocket. Near the end of the chase Swannack, at most 10 feet away, saw appellant discard an object using the same hand that was in the pocket. No more than three to four minutes later he retrieved the object, a package containing cocaine base, from the sidewalk area where it had been dropped. No one else was in the immediate area at that time.

Thus, there was abundant evidence from which the jury could associate appellant with the cocaine base found on the sidewalk, and from which it could determine that the drugs were possessed for sale. We must conclude, therefore, that any error arising from the mishandling of the pager numbers was harmless beyond a reasonable doubt.

Disposition

The judgment is affirmed.

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Elia, J.

WE CONCUR:

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Premo, Acting P.J.

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Mihara, J.